STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ENGINEERS MANAGEMENT CORPORATION, Petitioner, vs. FRED C. JONES, P.E., Respondent.	)	Case Nos. 05-3215PL 05-3216PL

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the formal hearing in this proceeding on January 10 and 11, 2006, in Bradenton, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Douglas D. Sunshine, Esquire
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For Respondent: Dominic C. MacKenzie, Esquire
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STATEMENT OF THE ISSUES

The issues presented are whether Respondent signed and sealed negligent drawings for one single-family residence and provided plan review certification for two other projects

designed by Respondent in violation of Subsections 471.033(1)(g) and 553.791(3), Florida Statutes (2002), and Florida Administrative Code Rule 61G15-19.001(6)(n).[1]

PRELIMINARY STATEMENT

On May 3, 2004, Petitioner filed an Administrative Complaint against Respondent in what became DOAH Case No. 05-3215PL. On April 7, 2005, Petitioner filed an Amended Administrative Complaint against Respondent in what became DOAH Case No. 05-3216PL. The two complaints are referred to hereinafter as the "charging documents."

Respondent requested a formal hearing. Petitioner referred the matters to DOAH, and the two charging documents were consolidated into one consolidated proceeding.

At the hearing, Petitioner presented the testimony of three witnesses and submitted 10 exhibits for admission into evidence. Respondent testified in his own behalf, presented the testimony of four witnesses, and submitted 10 exhibits for admission into evidence. The identity of the witnesses and exhibits and the rulings regarding each are reported in the Transcript of the hearing filed with DOAH on February 13, 2006.

The ALJ granted Respondent's unopposed motion to extend the time for filing proposed recommended orders (PROs) until April 3, 2006. Petitioner and Respondent timely filed their respective PROs on March 31 and April 3, 2006.

FINDINGS OF FACT

1. The Board of Professional Engineers (Board) is charged with regulating the practice of engineering pursuant to Chapter 455, Florida Statutes. Section 471.038, Florida Statutes, authorizes Petitioner to provide the Board with administrative, investigative, and prosecutorial services.

2. Respondent is licensed in the state as a professional engineer pursuant to license number PE 54476. It is undisputed that Respondent is a private provider within the meaning of Subsection 553.791(1)(g), Florida Statues.

3. On October 29, 2002, Respondent signed and sealed drawings for a single-family residence identified in the record as the Barnes residence. It is less than clear and convincing that the drawings for the Barnes residence are deficient.

4. The testimony of Respondent's expert witness was credible and persuasive. The applicable standard of care does not require the relevant drawings to include multiple ridge heights in order to describe the nature and character of the work to be performed with sufficient clarity.

5. It is less than clear and convincing that the ridge heights in the drawings are unequal. Additional ridge height information would have been non-critical information that may have been interpreted as specific construction requirements and

lead to confusion, added costs, conflicting interpretations, and potential hazards in buildings.

6. It is less than clear and convincing that the drawings for the Barnes residence insufficiently show heights of the eaves or lintels and sills. The plans can be easily understood by tradesmen and inspectors. The typical wall section at page 4 of the plans addresses eaves, lintels, and sills.

7. The ridge height requirements in Manatee County, Florida (the County), are intended to ensure compliance with maximum height restrictions. The mean heights in the drawings adequately address the maximum local height ordinances.

8. It is less than clear and convincing that the roof entry plan provided insufficient clarity. The roof was constructed according to the local code requirements without apparent exception. The evidence does not support a finding that the roof entry plan, the ridge heights, lintels, eaves, and sills were insufficiently clear to describe the nature and character of the work to be performed.

9. Clear and convincing evidence does not support a finding that the wind uplift for roof trusses in the plans was incorrect or unclear. If the wind load calculations were found to be deficient, the specified fittings were sufficient to withstand wind loads that exceeded the calculations of Petitioner's expert by approximately 70 percent.

10. Wind load calculations are intended to ensure a roof will sustain the load and will not blow off of the house. The fittings were sufficient to secure the roof against the projected wind load.

11. Clear and convincing evidence does not support a finding that the drawings failed to specify the applicable masonry inspection requirements. The evidence is less than clear and convincing that special masonry inspections are required for single-family residences of two stories or less. A masonry inspection is required for such structures when a building inspector finds a need for such an inspection.

12. It is less than clear and convincing that the drawings fail to adequately specify the splice lengths of the bond beam reinforcement for tension, compression, intersections, and corners. The requisite evidence does not support a finding that the plans deviate from the standard of care in the community.

13. Clear and convincing evidence does not support a finding that Respondent failed to comply with applicable soil condition requirements. The County did not require soil conditions on plans at the time Respondent drew the plans.

14. From sometime in the 1940s through November 2003, the County permitted engineers to assume soil conditions with a ground load of 2000 pounds per square foot. Respondent drew the plans for the Barnes project in 2002.

15. The testimony of Petitioner's expert does not relate to facts in evidence. The expert did not know County allowances for soil conditions at the time Respondent drew the plans.

16. The evidence is less than clear and convincing that the design of the concrete footings cannot be verified from the plans. Nor does the requisite evidence support a finding that the plans do not specify reinforcement of the thickened edge under a load bearing wood stud wall at the garage.

17. The plans include two reinforcement specifications for the thickened edge under the load bearing wood stud wall at the garage. The specifications include welded wire mesh and reinforced steel bars.

18. Clear and convincing evidence does not support a finding that Respondent supplied or submitted the Barnes plans for permit. Without such a finding, Respondent was not required to prepare, submit, or seal a site plan.

19. A site plan for the Barnes residence exists in the file of the County Building Department (Department). A Department representative confirmed that the site plan is sufficient and that an engineer of record is not required to prepare, submit, or seal a site plan unless the engineer of record actually submits the plans for a permit.

20. On February 24 and March 7, 2003, Respondent signed and sealed drawings for respective projects at 14815 Coker Gully

Road, Myakka, Florida (the Coker project), and 705 50th Avenue, Plaza West, Bradenton, Florida (the Yonkers project). Pursuant to Section 553.791, Florida Statutes, Respondent entered into a contract with an entity identified in the record as Griffis Custom Homes (Griffis) to provide either building code plans or inspection services, or both.

21. Prior to the commencement of the two projects in question, the Department expressly permitted an engineer to provide building code inspection services involving buildings designed or constructed by the engineer. Respondent prepared private provider affidavits, obtained additional insurance, had forms made, and prepared to provide inspections services.

22. Respondent immediately ceased his activities when Department officials objected to Respondent's stated intention of providing "private provider" building code inspection services for the Coker and Yonkers projects. The separate owners of the two projects withdrew their applications as "private provider" projects.

23. The Department processed the projects, performed all inspections, and issued a certificate of occupancy for each project. Neither the Department, Petitioner, nor the Board, ever served Respondent with a Notice of Non-compliance.

24. If it were found that Respondent committed the alleged violation, the violation was minor. There is no evidence of any

economic or physical harm, or significant threat of harm, to a person or to the health, safety, or welfare of the public. There is no evidence that Respondent has any prior discipline against his license.

CONCLUSIONS OF LAW

25. DOAH has jurisdiction over the parties and subject matter in this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2005). DOAH provided the parties with adequate notice of the formal hearing.

26. During the hearing, the undersigned reserved ruling on Respondent's objections to the admissibility of Petitioner's Exhibits 10 and 11. The first document is a letter written by Respondent to Petitioner during the agency's investigation of the complaints against Respondent.

27. The out-of-court statements attributed to Respondent in Petitioner's Exhibit 10 are admissions by a party opponent and are admissible in evidence for the truth of the matter stated, even though Respondent denies the admissions. § 90.803(18)(a), Fla. Stat. (2005); Lee v. Department of Health and Rehabilitative Services, 698 So. 2d 1194, 1200 (Fla. 1997); Christopher v. State, 583 So. 2d 642, 645 (Fla. 1991); Costa v. School Board of Broward County, 701 So. 2d 414, 415 (Fla. 4th DCA 1997); Seabord Coast Line Railroad Company v. Nieuwendaal, 253 So. 2d 451, 452 (Fla. 2d DCA 1971).

28. The admissions in Petitioner's Exhibit 10 need not be statements against the interest of Respondent to be admissible. They are admissible because they are the Respondent's own statements, and he cannot complain that he was not afforded the opportunity to cross-examine himself. State v. Elkin, 595 So. 2d 119, 120 (Fla. 3d DCA 1992); Adams v. School Board of Brevard County, 470 So. 2d 760, 762 (Fla. 5th DCA 1985).

29. Petitioner's Exhibit 11 is a report authored by Petitioner's expert witness in preparation for the formal hearing. The expert testimony and report were submitted for the sole purpose of assisting the trier of fact, by the expert's education, training, and experience, in reaching findings concerning the alleged negligence.

30. The report is 12 pages long. It contains various types of information, including statements of knowledge or intent on the part of various witnesses at the hearing and Respondent. Issues of knowledge and intent do not require expert testimony, but are factual issues susceptible of ordinary methods of proof. Dunham v. Highlands County School Board, 652 So. 2d at 896; Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco, 475 So. 2d at 1281.

31. The fact portion of the written report is not admissible as a public record or report prepared by a state agency. § 90.803(8), Fla. Stat. (2005); Lee, 698 So. 2d at

1201. The fact portion of the expert's written report is a record setting forth factual findings resulting from an investigation conducted pursuant to authority granted by law. Unlike the federal rule, Florida specifically excludes such reports. Lee, 698 So. 2d at 1201.

32. That part of the report that attributes out-of-court statements to Respondent is admissible. § 90.803(18)(a), Fla. Stat. (2005). The remainder of the report is admitted because it explains or supplements expert testimony during the hearing. § 120.57(1)(c), Fla. Stat. (2005).

33. In relevant part, Petitioner charges that Respondent committed "negligence" and "misconduct" in violation of Subsection 471.033(1)(g), Florida Statutes. The quoted terms are not defined by statute.

34. The applicable rule defines "negligence" to mean the failure to utilize "due care" in engineering or failing to have "due regard" for applicable standards of engineering principles. Fla. Admin. Code R. 61G15-19.001(4). Petitioner may not interpret the terms "due care" and "due regard" in a manner that enlarges, modifies, or contravenes the statute implemented. § 120.52(8), Fla. Stat. (2005).

35. If the agency were to interpret the terms "due care" and "due regard" in a manner that enlarged, modified, or contravened the statute implemented, the interpretation would be

tantamount to a legislative function and risk violation of the separation of powers clause. In relevant part, the separation of powers clause prohibits the executive branch and its administrative agencies from performing any legislative function. Art. 2, § 3, Fla. Const.; Ch. 20, Fla. Stat. (2005).

36. The non-delegation doctrine is a judicial corollary to the separation of powers clause. The non-delegation doctrine requires the legislature to provide standards and guidelines in an enactment that are ascertainable by reference to the terms of the enactment. Bush v. Shiavo, 885 So. 2d 321 (Fla. 2004); B.H. v. State, 645 So. 2d 987, 992-994 (Fla. 1994); Askew v. Cross Key Waterways, 372 So. 2d 913, 925 (Fla. 1978).

37. The doctrine prohibits the legislature from delegating to the executive branch power to enact a law or the right to exercise unrestricted discretion in applying the standards of "due care" and "due regard." Statutes granting power to the executive branch must clearly define the power delegated, preclude unbridled discretion, preclude the enlargement or modification of the law implemented, and ensure the availability of meaningful judicial review. Shiavo, 885 So. 2d at 332. See also Harrington & Co. v. Tampa Port Authority, 358 So. 2d 168, 170 (Fla. 1978)(statutory standard of "due regard" is a delegation of undefined power by the legislature and is tantamount to an abdication of lawmaking responsibility).

38. The agency's interpretation of statutory terms is not infused with policy considerations and is not entitled to deference. The agency did not articulate in the record, the underlying technical reasons for deference to agency expertise in the interpretation of statutory terms. Johnston, M.D. v. Department of Professional Regulation, Board of Medical Examiners, 456 So. 2d 939, 943-944 (Fla. 1st DCA 1984).

39. The issue of whether Respondent breached the applicable standard of care is a factual issue susceptible to ordinary methods of proof. Gross v. Department of Health, 819 So. 2d 997, 1003 (Fla. 5th DCA 2002). The burden of proof is on Petitioner to show by clear and convincing evidence that Respondent committed the acts alleged in the charging documents and the reasonableness of the proposed penalty. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

40. Only competent and substantial evidence may be considered as clear and convincing. In a license discipline proceeding, the term "competent and substantial evidence" takes on vigorous implications that are not present in other types of agency action. Robinson v. Florida Board of Dentistry, Department of Professional Regulation, 447 So. 2d 930, 932 (Fla. 3d DCA 1984).

41. The requirement for clear and convincing evidence imposes an intermediate level of proof on Petitioner. Petitioner must prove material factual allegations by more than a preponderance of the evidence, but the proof need not be beyond and to the exclusion of a reasonable doubt. Inquiry Concerning a Judge No. 93-62, 645 So. 2d 398, 404 (Fla. 1994); Lee County v. Sunbelt Equities, II, Limited Partnership, 619 So. 2d 996, 1006 n. 13 (Fla. 2d DCA 1993).

42. Inculpatory evidence is clear and convincing if it is credible, material facts are "distinctly remembered," testimony is "precise" and "explicit," and the inculpatory evidence is of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations that Petitioner seeks to establish. Inquiry Concerning a Judge, 645 So. 2d at 404. The judicial definition of clear and convincing evidence has been adopted by each District Court of Appeal in the state. E.F. v. State, 889 So. 2d 135, 139 (Fla. 3d DCA 2004); McKesson Drug Co. v. Williams, 706 So. 2d 352, 353 (Fla. 1st DCA 1998); Kingsley v. Kingsley, 623 So. 2d 780, 786-787 (Fla. 5th DCA 1993); Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

43. In weighing the inculpatory evidence in this proceeding, the fact-finder resolved any conflicts in the evidence and decided the issue one way or the other. Dunham,

652 So. 2d 894, 896 (Fla. 2d DCA 1995); Heifetz, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); Department of Professional Regulation v. Wagner, 405 So. 2d 471, 473 (Fla. 1st DCA 1981). In resolving evidential conflicts, the fact-finder assessed the credibility of witnesses and weighed the evidence, including the admissions attributed to Respondent. Bejarano v. State, Department of Education, Division of Vocational Rehabilitation, 901 So. 2d 891, 892 (Fla. 4th DCA 2005); Hoover, M.D. v. Agency for Health Care Administration, 676 So. 2d 1380, 1384 (Fla. 3d DCA 1996); Goss v. District School Board of St. Johns County, 601 So. 2d 1232, 1234 (Fla. 5th DCA 1992).

44. Expert testimony concerning the applicable standard of conduct in the local community and Respondent's alleged deviation from that standard was less than clear and convincing. Purvis v. Department of Professional Regulation, 461 So. 2d 134 (Fla. 1st DCA 1984). The evidence elicited by Respondent was of sufficient weight to prevent the trier of fact from forming a firm belief or conviction, without hesitancy, as to the truth of the allegations that Respondent failed to exercise "due care" or "due regard" in the drawings for the Barnes residence.

45. Respondent used his professional opinion to design the plans. Respondent relied upon a building permit issued by the local authority charged with interpreting the applicable building code. Respondent is not professionally negligent in

such circumstances. See Seibert v. Bayport Beach and Tennis Club Association, Inc., 573 So. 2d 889, 892 (Fla. 2d DCA 1990).

46. The remaining charge is that Respondent committed misconduct in violation of Subsection 471.033(1)(g), Florida Statutes. The term "misconduct" is not defined by statute. The applicable rule defines misconduct to mean the violation of any state law directly regulating the practice of engineering. Fla. Admin. Code R. 61G15-19.001(6)(n). Petitioner charges that Respondent violated Subsection 553.791(3), Florida Statutes, by allegedly designing the Coker and Yonkers projects and providing building code inspection services for each project.

47. Building code inspection services are statutorily defined to mean any of the services described in Subsections 468.603(6) and 468.603(7), Florida Statutes, that involve:

> [T]he review of building plans to determine compliance with applicable codes and those inspections required by law of each phase of construction for which permitting by a local enforcement agency is required to determine compliance with applicable codes. (emphasis supplied)

§ 553.791(1)(c), Fla. Stat.

48. A determination of whether the services Respondent provided for the Coker and Yonkers projects satisfied the statutory definition of building code inspection services must be strictly construed. Any ambiguity in the statute must be construed in favor of Respondent. State ex. rel. Jordan v.

Pattishall, 99 Fla. 296, 126 So. 147 (1930); Ocampo v. Department of Health, 806 So. 2d 633 (1st DCA Fla. 2002); Equity Corp. Holdings, Inc. v. Department of Banking and Finance, Division of Finance, 772 So. 2d 588, 590 (Fla. 1st DCA 2000); Jonas v. Florida Department of Business and Professional Regulation, 746 So. 2d 1261 (Fla. 3d DCA 2000); Loeffler v. Florida Department of Business and Professional Regulation, 739 So. 2d 150 (Fla. 1st DCA 1999); Haggerty v. Florida Department of Business and Professional Regulation, 716 So. 2d 873 (Fla. 1st DCA 1998); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164 (Fla. 1st DCA 1990); Rush v. Department of Professional Regulation, 448 So. 2d 26 (Fla. 1st DCA 1984); Ferdego Discount Center v. Department of Professional Regulation, 452 So. 2d 1063 (Fla. 3d DCA 1984); Bowling v. Department of Insurance, 394 So. 2d 165 (Fla. 1st DCA 1981); Lester v. Dept. of Professional and Occupational Regulations, 348 So. 2d 923 (Fla. 1st DCA 1977).

49. It is less than clear and convincing that Respondent provided building code inspection services for the Coker and Yonkers projects. The weight of the evidence shows that Department employees performed the required inspections.

50. Petitioner submitted evidence beyond the scope of the acts alleged in the charging documents. Disciplinary action cannot be predicated on facts not alleged in the charging

documents. Ghani v. Department of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); Cotrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Petitioner enter a final order finding Respondent not guilty of the alleged violations.

DONE AND ENTERED this 2nd day of May, 2006, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of May, 2006.

ENDNOTE

1/ The first alleged facts occurred on October 29, 2002, infra, Finding of Fact 3. References to statutes and rules are to those in effect immediately prior to October 29, 2002.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.